

7-1-1993

Expropriation, Torture, and Jus Cogens Under the Foreign Sovereign Immunities Act: *Siderman de Blake v. Republic of Argentina*

Philippe Lieberman

Follow this and additional works at: <http://repository.law.miami.edu/umialr>

Recommended Citation

Philippe Lieberman, *Expropriation, Torture, and Jus Cogens Under the Foreign Sovereign Immunities Act: Siderman de Blake v. Republic of Argentina*, 24 U. Miami Inter-Am. L. Rev. 503 (1993)

Available at: <http://repository.law.miami.edu/umialr/vol24/iss3/5>

This Case Comment is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

**EXPROPRIATION, TORTURE, AND *JUS*
COGENS UNDER THE FOREIGN
SOVEREIGN IMMUNITIES ACT:
SIDERMAN DE BLAKE v. REPUBLIC OF
*ARGENTINA***

I. INTRODUCTION	504
II. THE FOREIGN SOVEREIGN IMMUNITIES ACT	506
A. <i>Historical Background</i>	506
B. <i>The Commercial Activity Exception</i>	508
C. <i>The Expropriation Exception</i>	508
1. Rights in Property	509
2. Property Taken in Violation of International Law	510
3. Jurisdictional Nexus	510
III. RULES OF INTERNATIONAL LAW	512
A. <i>Customary International Law</i>	512
B. <i>Jus Cogens</i>	513
C. <i>Jus Cogens Against Torture</i>	514
IV. <i>SIDERMAN DE BLAKE v. REPUBLIC OF ARGENTINA</i>	516
A. <i>Facts and Procedural History</i>	516
B. <i>The Ninth Circuit's Opinion on the Expropriation Claims</i>	518
C. <i>The Ninth Circuit's Opinion on the Torture Claims</i>	520
V. ANALYSIS	521
A. <i>The Relationship Between the Commercial Activity Exception and Expropriation Claims</i>	521
B. <i>The Expropriation Exception</i>	529
1. Article 21 of the American Convention	529
2. Analyzing the Expropriation of INOSA Within the Contours of Article 21	530
C. <i>The International Law Principle of Jus Cogens and its Relationship to the FSIA</i>	532

D. A Framework for Analyzing Jus Cogens Violations as a Basis for Stripping FSIA Immunity	534
VI. CONCLUSION	539

I. INTRODUCTION

On March 24, 1976, following the Argentine military's overthrow of the government of President Maria Estela Peron, ten masked men carrying machine guns kidnapped 65-year-old José Siderman.¹ They beat and tortured him for seven days.² After his release, José, his wife, Lea, and son, Carlos, fled from Argentina to the United States to escape death threats.³ One year later, through a "sham judicial intervention,"⁴ the Argentine military seized the Sidermans' business, principally consisting of the Hotel Gran Corona, in Tucumán, Argentina.⁵

In 1982,⁶ the Sidermans filed an action in United States federal district court. They asserted eighteen claims based on José's torture by Argentine officials and the expropriation of their Argentine property.⁷ They claimed jurisdiction under the Foreign Sovereign Immunities Act (FSIA),⁸ Alien Torts Claims Act,⁹ diversity of citizenship,¹⁰ federal question,¹¹ and pendent jurisdiction.¹² The

1. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), cert. denied, 113 S. Ct. 1812 (1993).

2. *Id.* at 703.

3. *Id.*

4. *Id.* at 704. An "intervention" is a method used by Latin American despots to deprive persons of their property "by imposing a receivership on a person's property." First Amended Complaint, at 14, *Siderman de Blake v. The Republic of Argentina*, 1984 WL 9080, (C.D. Cal. Sept. 28, 1984), rev'd, 965 F.2d 699 (9th Cir. 1992) (No. 82-1772); Record at 14, *Siderman de Blake* (No. 85-5773) [hereinafter First Amended Complaint].

5. *Siderman de Blake*, 965 F.2d at 703.

6. In 1978, in an effort to end the intervention of their business, Inmobiliaria del Nor-Oeste, S.A. (INOSA), the Sidermans brought a successful derivative action in a Tucumán Court. Even though the Supreme Court of Tucumán upheld the Tucumán's lower court's order to end the intervention, the order remains unenforced. There is evidence that military officials turned the courts of Argentina into puppets. *Id.* at 704. The intervention enabled the Argentine military officials and INOSA appointed receivers to extract funds from INOSA's profits for themselves and purchase various of INOSA's assets at sharply discounted prices. *Id.*

7. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 703 (9th Cir. 1992). The Republic of Argentina, the Province of Tucumán, INOSA, and numerous individuals who participated in the actions were named defendants. *Id.* at 704.

8. 28 U.S.C.A. §§ 1330 (1993) and (West Supp. 1993).

9. 28 U.S.C.A. § 1350 (1988).

10. 28 U.S.C.A. § 1332(a)(2) (West Supp. 1993).

11. 28 U.S.C.A. § 1331 (1993).

district court dismissed the expropriation claims *sua sponte*, relying on the act of state doctrine, without considering subject matter jurisdiction.¹³ The court then ordered a hearing to provide the Sidermans with the opportunity to show damages relating to the torture claims.¹⁴ It denied the Sidermans' motion for reconsideration of the dismissal of the expropriation claims.¹⁵ The court entered a default judgment on the torture claims and awarded the Sidermans damages totalling \$2.7 million.¹⁶ On March 7, 1985, the district court granted Argentina's motion to vacate the default judgment for lack of subject matter jurisdiction, recognizing that country's immunity under the FSIA.¹⁷

The United States Court of Appeals for the Ninth Circuit reversed and remanded, holding that: (1) a court has jurisdiction over expropriation claims that fall within either the "commercial activity" or "international takings" exceptions of the FSIA; (2) a country waives immunity to claims that are directly connected with the foreign country's invocation of American judicial authority by letter rogatory; and (3) a claim asserting a foreign country's violation of a peremptory norm can be heard only if it falls within one of the FSIA's exceptions to sovereign immunity. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993).

This decision illustrates some of the hardships and complexities involved in bringing a suit under the FSIA. On the one hand, the court's ruling expands jurisdiction over foreign expropriation claims in American courts. For the first time a court has read the FSIA's commercial activity exception broadly to allow a foreigner to sue his own country for the expropriation of his properties there. This represents a significant interpretative shift because courts have historically interpreted the FSIA's grant of jurisdiction over expropriations to include only claims brought by non-citizens of the expropriating country. On the other hand, the court has read the FSIA narrowly, refusing to recognize that sovereigns who

12. First Amended Complaint, *supra* note 4, at 6.

13. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 704 (9th Cir. 1992).

14. *Id.*

15. The Sidermans did not dispute the dismissal of the claims against the individual defendants for lack of personal jurisdiction. *Id.*

16. *Id.* Argentina made no court appearance. Instead, it sought the assistance of the U.S. State Department which informed Argentina that it must appear in court to assert any defenses, including sovereign immunity, or risk a judgment of default. *Id.*

17. *Id.* at 704.

violate internationally recognized norms impliedly waive their immunity. The court flatly rejected a claim that countries violating a peremptory norm of international law, by torturing one of their citizens, lose their immunity.¹⁸ The consequence of these two holdings is absurd because they effectively make it easier for foreigners to sue their home country for expropriation of their property than for their torture.

II. THE FOREIGN SOVEREIGN IMMUNITIES ACT

A. Historical Background

Chief Justice Marshall was first, in a United States court, to adopt the international law doctrine of sovereign immunity in *The Schooner Exchange v. M'Faddon*.¹⁹ Under the doctrine recognizing a foreign state's sovereign immunity, a domestic court relinquished jurisdiction over a foreign state. It was "a matter of grace and comity on the part of the United States."²⁰ The State Department severely limited sovereign immunity by issuing the 1952 Tate Letter.²¹ The Tate Letter espoused adoption of the "restrictive" theory of sovereign immunity.²² The restrictive theory granted immunity for *jure imperii*, sovereign or public acts, only, but did not grant immunity for *jure gestionis*, private acts.²³ Under the restrictive theory, the State Department was primarily responsible for the initial determination of sovereign immunity.²⁴ As a result of

18. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992).

19. 11 U.S. (7 Cranch) 116 (1812). Chief Justice Marshall adopted the absolute theory of sovereign immunity which has no exceptions to the grant of immunity. *Id.*; see also H.R. REP. NO. 1487, 94th Cong., 2d Sess. 8, reprinted in 1976 U.S.C.C.A.N. 6604, 6606.

20. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).

21. Letter from Jack B. Tate, Acting Legal Advisor, U.S. Dep't. of State, to Acting Attorney General (May 19, 1952), reprinted in 26 DEP'T ST. BULL. 984 (1952); see also *Verlinden*, 461 U.S. at 487-88.

22. 461 U.S. at 487.

23. H.R. REP. NO. 1487, *supra* note 19, at 7. "Under this principle, the immunity of a foreign state is 'restricted' to suits involving a foreign state's public acts (*jure imperii*) and does not extend to suits based on its commercial or private acts (*jure gestionis*)." *Id.* The change in policy was a response to the increasing commercial activities conducted by foreign governments. It reflected the belief that courts should be available to one who engages in a commercial activity with a foreign state where that foreign government acted wrongly. Stella Havkin, Note, *The Foreign Sovereign Immunities Act: The Relationship Between the Commercial Activity Exception and the Noncommercial Tort Exception in Light of De Sanchez v. Banco Central de Nicaragua*, 10 HASTINGS INT'L & COMP. L. REV. 455, 459-60 (1987).

24. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487 (1983); Adam C. Belsky et al., *Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365, 369 (1989).

this allocation of responsibility, foreign nations often exerted political pressure on the State Department to obtain immunity.²⁵ Yet, sometimes the foreign state directly sought immunity from the courts.²⁶ As these two different and distinct branches of the government made independent determinations of sovereign immunity, the doctrine's status was unclear, its application was inconsistent, and its foundation was frequently rooted in political, rather than legal, determination.²⁷

As a consequence, in 1976 Congress passed the Foreign Sovereign Immunities Act²⁸ with four objectives: (1) to codify the restrictive theory of sovereign immunity; (2) to free the decision from non-legal, political pressure by transferring the determination of sovereign immunity from the executive branch to the judicial branch; (3) to provide statutorily for service of process on a foreign state; and (4) to furnish some means of executing a judgment against a foreign state.²⁹

The FSIA is the sole basis for a United States court's subject matter jurisdiction over a foreign country.³⁰ It provides a general grant of immunity to foreign states³¹ with certain exceptions.³² United States courts have subject matter jurisdiction only over those claims falling within one of the exceptions to immunity.³³ Therefore, if a plaintiff cannot assert a claim within one of the exceptions to immunity, a U.S. court has no subject matter jurisdiction to adjudicate the claim against the foreign state. This means that the foreign state will escape legal responsibility in U.S. courts for some international law violations. Consequently, the exceptions to sovereign immunity are crucial. Two FSIA exceptions, commercial activity and expropriation,³⁴ are particularly important to this

25. *Verlinden*, 461 U.S. at 487; Belsky, *supra* note 24, at 369.

26. *Verlinden*, 461 U.S. at 487. Courts based their determinations on prior State Department decisions. *Id.*; Belsky, *supra* note 24, at 369.

27. *Verlinden*, 461 U.S. at 488.

28. Codified at 28 U.S.C.A. §§ 1602-1611 (West Supp. 1993).

29. H.R. REP. NO. 1487, *supra* note 19, at 7-8.

30. *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 434 (1989) (U.S. courts lacked jurisdiction over Argentina in suit brought by Liberian corporation to recover value of oil tanker destroyed by Argentine military plane, since the Alien Tort Statute did not give the court jurisdiction over foreign sovereign).

31. 28 U.S.C.A. §§ 1602 and 1330(a) (West Supp. 1993).

32. *Id.* §§ 1604-1607, 1610 (West Supp. 1993). The exceptions reflect the idea that private interests in litigating claims outweigh the foreign state's interest in protecting its functions from judicial review. Havkin, *supra* note 23, at 463.

33. See *Amerasia Shipping Corp.*, 488 U.S. at 434.

34. The words "expropriation," "international takings," and "taking" are used inter-

Case Comment.

B. The Commercial Activity Exception

The commercial activity exception is codified in § 1605(a)(2).³⁵ It grants courts jurisdiction over claims involving a foreign government's commercial activities.³⁶ That is, jurisdiction based upon:

a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.³⁷

Courts have considerable latitude in determining what is a "commercial activity."³⁸ A commercial activity claim must pass a three part inquiry: (1) the court must identify the conduct that is relevant to the question of immunity; (2) it must characterize this conduct as a "commercial activity"; and (3) the court must determine whether the relevant commercial activity has the statutorily required nexus with both the cause of action and the United States.³⁹

C. The Expropriation Exception

The expropriation exception is codified in § 1605(a)(3).⁴⁰ It denies sovereign immunity for claims involving expropriations that violate international law.⁴¹

Although expropriation is a "quintessentially sovereign act,"⁴²

changeably in this Case Comment.

35. 28 U.S.C.A. § 1605(a)(2) (West Supp. 1993).

36. *Id.*

37. *Id.*

38. H.R. REP. NO. 1487, *supra* note 19, at 16.

39. Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 INT'L & COMP. L.Q. 302, 306-18 (1986); *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195 (5th Cir. 1984).

40. 28 U.S.C.A. § 1605(a)(3) (West Supp. 1993).

41. *Id.*

42. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964); *Alberti v. Empresa Nicaraguense*, 703 F.2d 250, 254 (7th Cir. 1983); *Carey v. National Oil Corp.*, 453 F. Supp.

Congress grants courts limited jurisdiction over such claims in codifying the restrictive theory of sovereign immunity.⁴³ Foreign states do not enjoy immunity in cases

in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.⁴⁴

The exception has three requirements: (1) the case must involve "rights in property"; (2) the property must be taken in violation of international law; (3) and the claim must meet a "jurisdictional nexus" with the United States.⁴⁵

1. Rights in Property

Courts have received little guidance from Congress in interpreting "property."⁴⁶ Some authorities have argued that since the language of § 1605(a)(3) parallels the language of the Hickenlooper Exception,⁴⁷ and the House's report has made a reference

1097, 1102 (S.D.N.Y. 1978), *aff'd*, 592 F.2d 673 (2d Cir. 1979); see also CHRISTOPH H. SCHREUER, *STATE IMMUNITY: SOME RECENT DEVELOPMENTS* 55 (1988) (citing French, Italian, and South African cases supporting the characterization of expropriation as a public, sovereign act). See generally IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 322, 533 (3d ed. 1979); MALCOLM N. SHAW, *INTERNATIONAL LAW* 430 (2d ed. 1986); Eduardo Jiménez de Arechaga, *State Responsibility for the Nationalization of Foreign-Owned Property*, in *INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE* 546, 547-48 (Richard Falk et al. eds., 1985).

43. H.R. REP. NO. 1487, *supra* note 19, at 7.

44. 28 U.S.C.A. § 1605(a)(3) (West Supp. 1993).

45. *Id.* See generally Mohammed Bedjaoui, *Some Unorthodox Reflections on the "Right to Development,"* in *INTERNATIONAL LAW OF DEVELOPMENT: COMPARATIVE PERSPECTIVES* 87, 105 (1987); D.P. O'CONNELL, *INTERNATIONAL LAW* 861-62 (1965).

46. H.R. REP. NO. 1487, *supra* note 19, at 19; see also JOSEPH W. DELLAPENNA, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* 179 (1988); Melissa L. Werthan et al., Note, *Jurisdiction Over Foreign Governments: A Comprehensive Review of the Foreign Sovereign Immunities Act*, 19 VAND. J. TRANSNAT'L L. 119, 147 (1986); Robert B. Von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 59-60 (1978); George Kahale, III & Matias A. Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States*, 18 COLUM. J. TRANSNAT'L L. 211, 252 (1979).

47. 22 U.S.C.A. § 2370(e)(2) (1990). The Hickenlooper Exception provides a statutory exception to the act of state doctrine "in a case in which a claim of title or other right to property is asserted." *Id.*

to that exception, Congress must have intended that courts interpret "property" in § 1605(a)(3) and in the Hickenlooper Exception similarly.⁴⁸ Thus, courts that use the Hickenlooper Exception as an interpretive guide for § 1605(a)(3) construe property as applying only to takings of tangible property, rather than contractual rights to receive payments.⁴⁹

2. Property Taken in Violation of International Law

According to U.S. courts, an expropriation violates international law if it: (1) does not serve a public purpose; (2) is discriminatory; or (3) fails to provide just compensation.⁵⁰ For example, when a nationalization program singles out aliens generally, aliens of a specific nationality, or particular, individual aliens, the resulting expropriation violates international law.⁵¹

3. Jurisdictional Nexus

An expropriation claim can meet the statutory nexus requirement in either of two ways. The first way, or clause one as it is often called,⁵² requires that the subject property or any property exchanged for such property be present in the United States.⁵³

48. See Kahale, III & Vega, *supra* note 46, at 252. But see DELLAPENNA, *supra* note 46, at 170 (arguing that courts should not interpret § 1605(a)(3) along the lines of the Hickenlooper Exception).

49. See *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1395 (5th Cir. 1985); *Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico*, 528 F. Supp. 1337, 1346 (S.D.N.Y. 1982), *aff'd*, 727 F.2d 274 (2d Cir. 1984). But see *West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 829-30 (9th Cir. 1987) (in rejecting the distinction between tangible and intangible property as overly formalistic and contrary to the motivating policies of the Hickenlooper Exception, the court held that certificate of deposit, which are contracts, are the type of property the Hickenlooper Exception sought to protect); *Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 616 F. Supp. 660, 663 (W.D. Mich. 1985) ("rights in property" includes intangible assets such as majority shares of a corporation).

50. *West v. Mutibanco Comermex, S.A.*, 807 F.2d 820, 831-32 (9th Cir. 1987). See generally RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1987) [hereinafter RESTATEMENT].

51. *West v. Multibanco*, 807 F.2d at 832. See BROWNLIE, *supra* note 42, at 539. "The test of discrimination is the intention of the government: the fact that only aliens are affected may be incidental, and, if the taking is based on economic and social policies, it is not directed against particular groups simply because they own the property involved." *Id.* at 539 n.5. See RESTATEMENT, *supra* note 50, § 712 cmt. f. See generally SHAW, *supra* note 42, at 435.

52. "Clause one" refers to the first part § 1605(a)(3) (West Supp. 1993).

53. 28 U.S.C.A. § 1605(a)(3) (West Supp. 1993).

Clause one also requires that the foreign state, or its political subdivisions, agencies, or instrumentalities use the property in connection with a commercial activity in the United States.⁵⁴ Yet, jurisdiction under the second clause does not require that the property, or property exchanged for it, be in the United States.⁵⁵ This is because a contrary reading of clause two, requiring the presence of expropriated property or any property exchanged for it in the United States, would effectively read clause one into clause two.⁵⁶

Although the second clause of § 1605(a)(3) may provide courts with a broader base of jurisdiction, the act of state doctrine may, nevertheless, bar adjudication of such claims.⁵⁷ That is because the act of state doctrine mandates that courts "not 'sit in judgment' on the acts of the government of another country,"⁵⁸ carried out in that country.

Not all expropriation claims would be barred by the act of state doctrine. In *Banco Nacional de Cuba v. Sabbatino*,⁵⁹ the Court held that it would not examine the validity of a Cuban expropriation.⁶⁰ As a consequence of this holding, Congress passed

54. *Id.*; see also H.R. REP. No. 1487, *supra* note 19, at 19; 28 U.S.C.A. § 1603(b) defines "agency or instrumentality of a foreign state" as any entity:

(1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

See § 1603 (a) and (c) for definitions of "foreign state" and the "United States"; Werthan, *supra* note 46, at 150-51 (courts examine the activities of the agency in question, not those of the foreign nation as a whole).

55. H.R. REP. No. 1487, *supra* note 19, at 19. "Under the second category, the property need not be present in connection with a commercial activity of the agency or instrumentality." *Id.*; see also Von Mehren, *supra* note 46, at 59; Werthan, *supra* note 46, at 501; Kahale, III & Vega, *supra* note 46, at 255 (arguing that to meet the minimum jurisdictional contacts necessary, where the property is not present in the United States, courts should require more than a single, unrelated commercial transaction of the agency in this country).

56. Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia, 616 F. Supp. 660 (D.C. Mich. 1985), is consistent with this view. The court found jurisdiction under the second clause of 1605(a)(3), even though the expropriated property was in Ethiopia. *Id.* at 664.

57. DELLAFENNA, *supra* note 46, at 268-319; O'CONNELL, *supra* note 45, at 874-76. Chief Justice Fuller first expressed the act of state doctrine in *Underhill v. Hernandez*, 168 U.S. 250 (1897).

58. O'CONNELL, *supra* note 45, at 874. The basis of the act of state doctrine lies in the principle of sovereignty and equality of states. SHAW, *supra* note 42, at 120.

59. 376 U.S. 398 (1964).

60. *Id.* at 436-39. Justice Harlan concluded that the act of state doctrine had "constitutional underpinnings" arising out of separation of powers to permit the executive to prop-

the Hickenlooper Amendment,⁶¹ or Hickenlooper Exception, reversing the decision of *Sabbatino*.⁶² However, the scope of the Hickenlooper Exception extended only to cases falling under the first clause of § 1605(a)(3). Thus, there remained a high risk that the act of state doctrine would continue to bar those expropriation claims, such as the *Sidermans*', brought under the second clause of § 1605(a)(3).⁶³

III. RULES OF INTERNATIONAL LAW

A. Customary International Law

Customary international law comprises the "general and consistent practice of states followed by them from a sense of legal obligation."⁶⁴ United States courts have enforced this kind of law.⁶⁵ Courts determine what is or is not customary international law by consulting the works of jurists writing on the subject, the general usage and practice of nations, international conventions and treaties, as well as national and international court decisions.⁶⁶

Rules of international law can either be *jus dispositivum* or *jus cogens*.⁶⁷ *Jus dispositivum* consists of customary norms that

erly conduct foreign affairs. *Id.* at 416-23.

61. 22 U.S.C.A. § 2370(e)(2) (1990). "[N]o court in the United States shall decline on the ground of the Federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted . . . based upon a confiscation or other taking . . . , by an act of that state in violation of the principles of international law," *Id.* It is sometimes called the Sabbatino amendment.

62. D.W. GREIG, *INTERNATIONAL LAW* 65 (1970); DELLAPPENNA, *supra* note 46, at 274.

63. Mark B. Feldman, *Foreign Sovereign Immunity in the United States Courts 1976-1986*, 19 VAND. J. TRANSNAT'L L. 50, 51 (1986).

64. Committee of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988); RESTATEMENT, *supra* note 50, § 102(2); see also David F. Klein, *A Theory for the Application of the Customary International Law of Human Rights by Domestic Courts*, 13 YALE J. INT'L L. 332 (1988); Karen Parker & Lyn B. Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 414-23 (1989). See generally BROWNIE, *supra* note 42, at 512-15; HERSCH LAUTERPACHT, *INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT* 61 (E. Lauterpacht ed., 1970).

65. *The Paquete Habana*, 175 U.S. 677 (1900).

66. *Id.* at 700-01; *United States v. Smith*, 18 U.S. (5 Wheat) 153, 160-61 (1820); *Filar-tiga v. Pena-Irala*, 630 F.2d 876, 880-81 (2d Cir. 1980).

67. Klein, *supra* note 64, at 350-53; see also THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 220-22 (1989). See generally, RICHARD B. LILICH, *INVOKING INTERNATIONAL HUMAN RIGHTS LAW IN DOMESTIC COURTS* 11-16 (1985); Parker & Neylon, *supra* note 64, for an in depth study on *jus cogens*.

depend on the respective nations' consent for enforcement.⁶⁸ Thus, continued and consistent objection to an emerging *jus dispositivum* norm precludes enforcement of the norm on the objecting state. However, the norm still binds non-objecting nations.⁶⁹ Unlike a *jus cogens* norm, a state may alter a *jus dispositivum* norm. They do so by encouraging other states to violate it,⁷⁰ or by abrogating the norm by treaty.⁷¹

B. Jus Cogens

*Jus cogens*⁷² norms differ in that they bind all nations. Once a norm becomes *jus cogens*,⁷³ it binds all nations absolutely, regardless of express consent.⁷⁴ In fact, the Restatement defines *jus cogens* as peremptory norms precisely because no derogation from them is permissible.⁷⁵ The Restatement states that "[t]hese rules prevail over and invalidate international agreements and other rules of international law in conflict with them."⁷⁶

The Vienna Convention on the Law of Treaties (Vienna Convention) unambiguously incorporates *jus cogens* by stating that:

[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm which can

68. Klein, *supra* note 64, at 351. See generally Parker & Neylon, *supra* note 64, at 417-18.

69. Parker & Neylon, *supra* note 64, at 418; GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 10 (Hurst Hannun ed., 2d ed. 1992) [hereinafter HUMAN RIGHTS PRACTICE] (a nation does not have to be in full conformity, all of the time, with a *jus dispositivum* rule to be bound to it).

70. Klein, *supra* note 64, at 351.

71. *Id.*

72. "*Jus cogens*" and "peremptory norms" are used interchangeably in this note.

73. In order for a norm of customary international law "to become a peremptory norm, there must be a further recognition by the international community . . . as a whole that this is a norm from which no derogation is permitted." Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 940 (D.C. Cir. 1988) (emphasis in original) (quoting the Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 331) [hereinafter Vienna Convention].

74. For example, in *Nicaragua v. United States of America*, even though the United States claimed justifications for the use of force, the court held that the United States violated *jus cogens*; 1986 I.C.J. 14, 98; see also MENNO T. KAMMINGA, INTER-STATE ACCOUNTABILITY FOR VIOLATIONS OF HUMAN RIGHTS 157-59 (1992).

75. RESTATEMENT, *supra* note 50, § 102, cmt. k.

76. *Id.*

be modified only by a subsequent norm of general international law having the same character.⁷⁷

Article 64 of the Vienna Convention further provides that "if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."⁷⁸

Peremptory norms are different in that they serve the developing interests of the international community "as a whole",⁷⁹ not just particular ideological or political goals of the stronger nations.⁸⁰ However, the combination of this broad focus with the requirement that a *jus cogens* norm be recognized by the international community as a whole also limits their scope and quantity.

Due to the evolving nature of peremptory norms, the drafters of the Vienna Convention refrained from enumerating a list of peremptory norms.⁸¹ In spite of this reluctance, there has been wide agreement on past and current peremptory norms. A nation's practice, encouragement, or condonation of acts of genocide, slavery, murder or disappearance, torture, prolonged arbitrary detention, systematic racial discrimination, or consistent pattern of gross violations of international human rights have been recognized as peremptory norm violations.⁸²

C. *Jus Cogens Against Torture*

Of the recognized peremptory norms, the norm against torture is particularly relevant to this note. Torture is widely regarded as a violation of a peremptory norm of international law.⁸³ All major human rights agreements,⁸⁴ as well as the Torture Convention,⁸⁵

77. Vienna Convention, *supra* note 73, art. 53; see also RESTATEMENT, *supra* note 50, § 102 reporter's note 6 (comment k to this section adopts for the Restatement the definition of *jus cogens* of Article 53 of the Vienna Convention).

78. Vienna Convention, *supra* note 73, art. 64. Just as treaties pertaining to an illegal object are non-binding, treaties lose their enforceable power when, through developments of international law, they become inconsistent with peremptory norms. Peremptory norms can also lose their characteristic as *jus cogens*. Parker & Neylon, *supra* note 64, at 427 n.91.

79. See note 73.

80. SHAW, *supra* note 42, at 95; see also Parker & Neylon, *supra* note 64, at 428.

81. Parker & Neylon, *supra* note 64, at 428.

82. RESTATEMENT, *supra* note 50, § 702, cmt. n.

83. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); Committee of U.S. Citizens in *Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1980); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987); RESTATEMENT, *supra* note 50, § 712.

84. Parker & Neylon, *supra* note 64, at 437 cites the *Universal Declaration of Human*

prohibit torture. The United Nations' Rapporteur on Torture⁸⁶ reports that:

[t]orture is now absolutely and without any reservation prohibited under international law whether in time of peace or of war. In all human rights instruments the prohibition of torture belongs to the group of rights from which no derogation can be made. The International Court of Justice has qualified the obligation to respect the basic human rights, to which the right not to be tortured belongs beyond any doubt, as obligations *erga omnes*, obligations which a State has *vis-à-vis* the community of States as a whole and in the implementation of which every State has a legal interest. . . . In view of these qualifications the prohibition of torture can be considered to belong to the rules of *jus cogens*. If ever a phenomenon was outlawed unreservedly and unequivocally it is torture.⁸⁷

United States courts have equally recognized torture as a violation of a peremptory norm. In *Filartiga v. Pena-Irala*,⁸⁸ Judge Kaufman explained that "there are few, if any, issues in international law today on which opinion seems so united as the limitations on a state's power to torture persons held in its custody."⁸⁹

Rights, G.A. Res. 217(III)A, art. 5, U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 7, 999 U.N.T.S. 171 (1976); European Convention For the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 3, Europ. T.S. No. 5; The African (Banjul) Charter on Human and Peoples' Rights, O.A.U. Doc CAB/LEG67/3 rev. 5, 21 I.L.M. 58, art. 5 (1982); Standard Minimum Rules for the Treatment of Prisoners, at 67, U.N. Doc. A/CONF. 6, 67 (1956); *Declaration of the Rights of the Child*, G.A. Res. 169, 34 U.N. GAOR 34th Sess., Supp. No. 46, art. 5, at 185, U.N. Doc A/34/46 (1980); International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* March 7, 1966, 660 U.N.T.S. 195 (1967); and *Principles of Medical Ethics*, G.A. Res. 3/194, U.N. GAOR, 37th Sess., Supp. no. 51, principle 2, at 510, U.N. Doc. A/37/51 (1983).

85. Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, G.A. Res. 46, U.N. GAOR, 39th Sess. Supp. No. 51, U.N. Doc. A/39/51 (1985), *reprinted in* 23 I.L.M. 1027 (1984).

86. The United Nations appointed the Special Rapporteur "to promote the full implementation of the prohibition under international and national law of the practice of torture and other cruel, inhuman, or degrading treatment or punishment." TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, at 5 U.N. Doc. No. 15 E/CN.4/1986 (1986).

87. *Id.* at 1 (emphasis in original). "Torture may be the plague of the second half of the twentieth century" *Id.*

88. 630 F.2d 876 (2d Cir. 1980) (when alleged torturer is found and served with process by an alien in the United States, the Alien Tort Statute provides federal jurisdiction). See generally Daniel S. Dokos, Note, *Enforcement of International Human Rights in the Federal Courts after Filartiga v. Pena-Irala*, 67 VA. L. REV. 1379 (1981).

89. 630 F.2d at 881. Judge Kaufman continued, "[a]mong the rights universally proclaimed by all nations, . . . is the right to be free of physical torture." *Id.* at 890.

Judge Kaufman explained, this "prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens."⁹⁰ The Court of Appeals for the District of Columbia Circuit gave the most extended discussion of *jus cogens* prior to *Siderman de Blake*. In *Committee of U.S. Citizens in Nicaragua v. Reagan*,⁹¹ the court stated that *jus cogens* comprised the "fundamental human rights law that prohibits genocide, slavery, murder, torture, prolonged arbitrary detention, and racial discrimination."⁹² In a case arising from similar violations by the same Argentine military government responsible for Siderman's torture, *Forti v. Suarez-Mason*,⁹³ the court held that "official torture constitute[d] a cognizable violation of the law of nations."⁹⁴ This law was "universal, obligatory, and definable."⁹⁵

IV. *SIDERMAN DE BLAKE V. REPUBLIC OF ARGENTINA*

A. *Facts and Procedural History*

On the evening of the 1976 military coup in Argentina,⁹⁶ ten men carrying machine-guns kidnapped José Siderman.⁹⁷ They beat and tortured⁹⁸ Siderman for seven days.⁹⁹ His captors and torturers then dumped him¹⁰⁰ in an isolated area and threatened to kill him, his wife, Lea, and son, Carlos.¹⁰¹ In an effort to raise cash

90. *Id.* at 884.

91. 859 F.2d 929 (D.C. Cir. 1988).

92. *Id.* at 941.

93. 672 F. Supp. 1531 (N.D. Cal. 1987), *motion for reconsideration granted in part*, 694 F. Supp. 707 (N.D. Cal. 1988). *See also generally* Christopher M. Leh, Comment, *Remedying Foreign Repression Through U.S. Courts: Forti v. Suarez and the Recognition of Torture, Summary Execution, Prolonged Arbitrary Detention and Causing Disappearance as Cognizable Claims Under the Alien Tort Claims Act*, 20 N.Y.U. J. INT'L L. & POL. 405 (1988).

94. 672 F. Supp. at 1541.

95. *Id.*

96. *See Forti v. Suarez-Mason*, 672 F. Supp. at 1536 (describing events prior to and after the coup).

97. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 703 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993).

98. *Id.* at 703. The torture of Siderman included the use of an electric cattle prod giving him electric shocks until he fainted. As they tortured, the Argentine military men shouted anti-Semitic epithets, calling him a "jew bastard" and a "shitty jew." *Id.* *See generally* Emilio F. Mignone et al., *Dictatorship on Trial: Prosecution of Human Rights Violations in Argentina*, 10 YALE J. INT'L L. 118 (1984) (describing the human rights violations of the military regime and attempts at justice under the government of President Alfonsín).

99. 965 F.2d at 703.

100. Siderman suffered from serious bruising and broken ribs. *Id.*

101. *Id.*

before fleeing to the United States to join Susana Siderman de Blake, his daughter and a U.S. citizen since 1967, José sold his interest in 127,000 acres of land for roughly ten percent of its market value.¹⁰² The Sidermans also granted management powers over their business, Inmobiliaria del Nor-Oeste, S.A. (INOSA),¹⁰³ to a certified public accountant in Argentina.¹⁰⁴ In April 1977, through a "sham judicial intervention,"¹⁰⁵ the Argentine military seized INOSA purportedly because it lacked a representative in Argentina¹⁰⁶ and because it obtained excessive funds from a Tucumán bank.¹⁰⁷ The Ninth Circuit Court of Appeals stated that these were merely pretexts for persecuting the Sidermans because of their religion and economic success.¹⁰⁸

In 1982, the Sidermans filed an action in federal district court against Argentina seeking relief for claims based on the expropriation of INOSA and José's torture.¹⁰⁹ The district court dismissed the expropriation claims on the basis of the act of state doctrine, without considering subject matter jurisdiction.¹¹⁰ The court

102. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 703 (9th Cir. 1992). Siderman received \$210,000 for land with a market value of over \$12 million. First Amended Complaint, *supra* note 4, at 12. When the Sidermans were in the United States, the Argentine military renewed their persecution of José. They altered the real property records of Tucumán to show that José Siderman once owned 127 acres of land, not the 127,000 acres he sold. *Siderman de Blake*, 965 F.2d at 703, 722. The military officials subsequently instituted an action against him in Argentina for selling land that did not belong to him. *Id.* Argentina requested the assistance of the Los Angeles Superior Court in serving José with documents relating to that action. *Id.* The court complied with the request, unaware of the fraudulent situation. *Id.* The Ninth Circuit held, in *Siderman de Blake v. Republic of Argentina*, that invoking the U.S. judicial system, via letter rogatory, in an effort to further torture and persecute Siderman, constituted a waiver of immunity from the torture claims. *Id.*

103. An Argentine corporation owned by Susana Siderman de Blake (33%), Lea Siderman (33%), Carlos Siderman (33%) and José Siderman (1%). *Siderman de Blake*, 965 F.2d at 703. Its assets included vast real estate holdings and the Hotel Gran Corona. *Id.* At the time of the intervention, the holdings of INOSA had an approximate value of \$25 million. First Amended Complaint, *supra* note 4, at 8.

104. *Siderman de Blake*, 965 F.2d at 703.

105. *Id.* at 704.

106. Argentine officials killed the certified public accountant to whom the Sidermans granted management powers over INOSA before the Sidermans left Argentina. *Id.*

107. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 704 (9th Cir. 1992).

108. *Id.*

109. *Id.*

110. *Id.* The Ninth Circuit held that the district court erred in not considering subject matter jurisdiction first. The court said "at the threshold of every action in a district court against a foreign state, . . . the court must satisfy itself that one of the FSIA exceptions applies." *Id.* at 706 (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983)). This is an issue that the court must address even if the foreign country fails to

awarded the Sidermans a default judgment of \$2.7 million for José's torture.¹¹¹ It dismissed this judgment after Argentina claimed immunity under the FSIA.¹¹²

B. The Ninth Circuit's Opinion on the Expropriation Claims

On appeal, the Ninth Circuit Court of Appeals considered the expropriation and torture claims separately because the district court dismissed them at different stages of the suit.¹¹³ Within the expropriation claims for the illegal intervention of INOSA, the Sidermans asserted claims for Argentina's continuing management of INOSA.¹¹⁴ In holding that these claims fell under the commercial activity exception¹¹⁵ to the FSIA, the Ninth Circuit applied the three clauses of the commercial activity exception.¹¹⁶ First, Argentina's continuing management of the Hotel Gran Corona, its advertising of the hotel in the United States, and receipt of payment through major American credit cards were commercial activities "carried on in the United States"¹¹⁷ having "substantial contact"¹¹⁸ with it.¹¹⁹ Furthermore, Argentina's receipt of profits from the hotel formed the required "nexus"¹²⁰ between the commercial activities and the Sidermans' grievances.¹²¹ This brought their expropriation claim within the first clause of the commercial activity exception.

Second, Argentina's solicitation of American guests for the hotel and booking reservations in the United States directly related

appear in court. *Verlinden*, 461 U.S. at 494 n.20. Note that the act of state doctrine bars a suit for failure to state a claim upon which relief can be given (Fed. R. Civ. P. 12(b)(6)), while sovereign immunity bars a claim for lack of subject matter jurisdiction (Fed. R. Civ. P. 12(b)(1)). 965 F.2d at 707.

111. 965 F.2d at 704.

112. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 669, 704 (9th Cir. 1992).

113. *Id.* at 706.

114. *Id.* at 708.

115. 28 U.S.C.A. § 1605(a)(2) (West Supp. 1993).

116. 965 F.2d at 708-10.

117. 28 U.S.C.A. § 1605(a)(2) (West Supp. 1993).

118. *Id.* § 1603(e); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 669 708-09 (9th Cir. 1992).

119. 965 F.2d at 708-09.

120. *Id.* at 709 (citing *America West Airlines, Inc. v. G.P.A. Group, Ltd.*, 877 F.2d 793, 796 (9th Cir. 1989)).

121. *Id.* at 709. The court also noted that a sham judicial intervention "may" constitute a "commercial activity," if the Sidermans proved on remand that this was an activity that a private person could perform in Argentina. *Id.* at 709 n.10.

to the Sidermans' causes of action for conversion, constructive fraud, intentional interference with business relationships, and breach of fiduciary duty.¹²² The court stated that, these allegations met the requirements of the second clause because they were based "upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere."¹²³

Finally, the court stated, if the Sidermans proved that the articles of incorporation of INOSA entitled them, as shareholders, to receipt of dividends at their place of residence, then their expropriation claims fell within the third clause of the commercial activity exception. The receipt of dividends in the United States would have a "direct effect" on the United States.¹²⁴

The court also applied the international takings exception¹²⁵ to the expropriation claims.¹²⁶ Since it held that at this stage of the action the court must only ascertain whether the complaint properly alleged a violation of the international takings exception,¹²⁷ the court reviewed the complaint filed by the Sidermans.

The complaint alleged that Argentina expropriated INOSA because the Sidermans were a Jewish family,¹²⁸ a discriminatory motivation based on ethnicity, and did not compensate the Sidermans for their property.¹²⁹ This was a violation which met the requirements of the international takings exception because it constituted a violation of international law.¹³⁰ Furthermore, the expropriation claims met the jurisdictional nexus requirement of the second clause of the expropriation exception.¹³¹ The complaint alleged that INOSA, as an agency, solicited American guests for the Hotel Gran Corona and accepted major American credit cards for payment.¹³² There was no requirement, under the second clause of the exception, that the property be in the United States.¹³³

122. *Id.* at 709.

123. 28 U.S.C.A. § 1605(a)(2) (West Supp. 1993).

124. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 669, 711 (9th Cir. 1992).

125. 28 U.S.C.A. § 1605(a)(3) (West Supp. 1993).

126. *Siderman de Blake*, 965 F.2d at 712.

127. *Id.* at 711.

128. *Id.* at 712.

129. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 669, 712 (9th Cir. 1992).

130. *Id.*; see also RESTATEMENT, *supra* note 50, § 712 cmt. f; *supra* notes 50-51 and accompanying text.

131. 965 F.2d at 712; see also *supra* text accompanying notes 52-56.

132. 965 F.2d at 712.

133. *Id.*; see also *supra* notes 55-56 and accompanying text.

However, since José, Lea, and Carlos were Argentine citizens at the time of the intervention,¹³⁴ and because "expropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law,"¹³⁵ the court held that José, Lea, and Carlos could not invoke this exception.¹³⁶ Therefore, only Susana, an American citizen since 1967,¹³⁷ could assert a claim within the international takings exception to immunity for the expropriation claims.¹³⁸

Even though the court may have jurisdiction over the expropriation claims, the Ninth Circuit noted that, on remand, the district court could consider the act of state doctrine.¹³⁹ However, the act of state doctrine could only be considered after the court determines whether it has subject matter jurisdiction.¹⁴⁰

C. *The Ninth Circuit's Opinion on the Torture Claims*

The court also held that, when a state violates a peremptory norm, the cloak of immunity provided by international law does not fall away.¹⁴¹ While the court described torture extensively as a

134. José, Lea, and Carlos were still not U.S. citizens at the time of the Ninth Circuit's holding. See generally *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), cert. denied, 113 S. Ct. 1812 (1993).

135. 965 F.2d at 711 (citing *Chuidian v. Philippine Nat'l. Bank*, 912 F.2d 1095, 1105 (9th Cir. 1990)); see also *De Sanchez v. Banco Central De Nicaragua*, 770 F.2d 1385, 1396 (5th Cir. 1985) ("As long as a nation injures only its own nationals, . . . then no other state's interest is involved; the injury is a purely domestic affair to be resolved within the confines of the nation itself.").

136. 965 F.2d at 711.

137. *Id.* at 704.

138. Because only Susana Siderman de Blake met the requirements of the expropriation exception, it was crucial to José, Lea, and Carlos that they successfully allege jurisdiction under the commercial activities exception.

139. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 669, 713 (9th Cir. 1992).

140. *Id.* Note that the Ninth Circuit's opinion concerns only whether or not the court had subject matter jurisdiction over the Sidermans' claims. That is, since the lower court dismissed the claims on the basis of the act of state doctrine without considering subject matter jurisdiction, no decision was ever reached on the merits.

141. *Id.* at 719. The court also held that the existing treaty exception did not apply. *Id.* *The Universal Declaration of Human Rights*, G.A. Res. 217A(III), was a non-binding authoritative statement of customary international law, but not an international agreement for purposes of the existing treaty exception, 28 U.S.C.A. § 1604. It also held that the U.N. Charter, which does not discuss compensation or individual remedies, does not "expressly conflict" with the FSIA. *Id.* at 719-20. However, the court held Argentina waived immunity. By invoking U.S. judicial authority, by letter rogatory, in attempting to enlist the Los Angeles Superior Court's help in serving process on José Siderman in its lawsuit against him in Argentina, for selling land which he allegedly did not own, Argentina waived immunity on the torture claims. *Id.* at 720-22.

violation of *jus cogens*, the court felt powerless, in light of *Argentine Republic v. Amerada Hess Shipping Corp.*,¹⁴² to deny Argentina immunity.¹⁴³ In *Amerada Hess*,¹⁴⁴ the United States Supreme Court held that the FSIA was the sole basis for obtaining jurisdiction over a foreign state in the courts of this country.¹⁴⁵ In granting Argentina immunity in *Siderman de Blake*, the Ninth Circuit stated:

[t]he Court was so emphatic in its pronouncement 'that immunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions,' and, so specific in its formulation and method of approach, that we conclude that if violations of *jus cogens* committed outside the United States are to be exceptions to immunity, Congress must make them so.¹⁴⁶

V. ANALYSIS

A. *The Relationship Between the Commercial Activity Exception and Expropriation Claims*

Prior to the adoption of the FSIA, a foreign nation sued for expropriation was immune.¹⁴⁷ Due to the heightened sensitivity in cases of foreign expropriation,¹⁴⁸ Congress only granted very limited jurisdiction over those claims which met certain strict requirements.¹⁴⁹ These requirements were threshold questions, preventing plaintiffs from circumventing them through artful pleadings.¹⁵⁰

In short, the requirements are important. By allowing the Sidermans to shape claims that concern activities subsequent to an expropriation, a "quintessentially sovereign act,"¹⁵¹ a court ex-

142. 488 U.S. 428 (1989).

143. 965 F.2d at 714-19.

144. 488 U.S. at 428.

145. *Id.* at 443.

146. *Siderman de Blake*, 965 F.2d at 719 (citations omitted).

147. See George Kahale, III, *Characterizing Nationalizations for Purposes of the Foreign Sovereign Immunities Act and the Act of State Doctrine*, 6 FORDHAM INT'L L.J. 398 (1983).

148. This sensitivity is rooted in the fact that countries have sovereign rights over their resources and economic activities; "Nationalization is the supreme manifestation of sovereignty and of the right to development." Bedjaoui, *supra* note 45, at 105.

149. Feldman, *supra* note 63, at 50. The requirements are listed in § 1605(a)(3).

150. See *generally* Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1106 (9th Cir. 1990).

151. See *supra* note 42.

tends, for all practical purposes, the very grant of jurisdiction which Congress originally intended to be narrow.

A claim based on an act of expropriation does not meet the requirements of the commercial activities exception.¹⁵² Congress has defined "commercial activity" to mean a regular course of commercial conduct or a particular commercial transaction.¹⁵³ The nature of the activity defines the transaction's commercial character. Therefore, activities in which a private person can engage are commercial.¹⁵⁴ On the other hand, "[a]n activity is public and 'non-commercial' if it is one which only a sovereign state can perform."¹⁵⁵

Expropriation is a sovereign act.¹⁵⁶ The FSIA supports this characterization because a private person is incapable of expropriating a party's property.¹⁵⁷ Therefore, as a sovereign act, expropriation does not fall within the commercial activities exception. As a result, the Sidermans' claim, because of its very nature as an expropriation claim, was wrongly decided under the commercial activity exception.

First, because the Sidermans' real grievance was the expropriation of INOSA, Argentina's solicitation of American guests following the expropriation did not have a sufficient nexus with the act of expropriation. Therefore, the Sidermans' allegations that, as an agency of Argentina, INOSA's commercial activities following the expropriation brought their claims within the commercial activity exception of the FSIA,¹⁵⁸ incorrectly concentrated on the activities following the expropriation. This is because the guest solicitation in the United States, after the expropriation of INOSA, did not have a sufficient nexus with the act of expropriation.

Expropriation is a truly sovereign act. Once a country expropriates, it should, logically, be able to do as it sees fit with the expropriated property. For all practical purposes, the country now owns the property and the subsequent commercial activities in

152. Kahale, III, *supra* note 147, at 398.

153. 28 U.S.C.A. § 1603(d) (West Supp. 1993).

154. *Joseph v. Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1024 (9th Cir. 1987).

155. *Id.* at 1024.

156. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964); *Alberti v. Empresa Nicaraguense*, 705 F.2d 250, 254 (7th Cir. 1983); *Carey v. National Oil Corp.*, 453 F. Supp. 1097, 1102 (S.D.N.Y. 1978), *aff'd*, 592 F.2d 673 (2d Cir. 1979).

157. *But see* note 121.

158. First Amended Complaint, *supra* note 4, at 19-20.

which the country engages do not provide the court with jurisdiction. Therefore, the Ninth Circuit effectively took an expropriation, focused on the commercial activities subsequent to that expropriation, and treated the claim as a commercial activity, making it fall within the commercial activity exception to strip Argentina of its Foreign Sovereign immunity. Instead of concentrating on the commercial activities following the expropriation, the Ninth Circuit's inquiry should have focused on the act of expropriation itself to protect expropriation's sovereign character.

Second, excluding the Sidermans' expropriation claim from the commercial activity exception would have been consistent with Congressional intent. The legislative history of the commercial activities exception reflects Congress' intent that it not apply to claims arising out of expropriation.¹⁵⁹ This is because a claim, like the Siderman's, principally based on expropriation, does not meet the requirements of the commercial activity exception, § 1605(a)(2).

The second clause of this section denies immunity "upon an act performed in the United States *in connection* with a *commercial activity* of the foreign state elsewhere."¹⁶⁰ The third clause of that same section denies immunity "upon an act outside the territory of the United States *in connection* with a *commercial activity* of the foreign state elsewhere and that act causes a direct effect in the United States."¹⁶¹ The two clauses differ only in the location where the "act" must occur. Therefore, given that expropriation is a sovereign act, and that the legislative history strongly suggests that the court concentrate on the act at issue, the key question is whether the "act" performed in connection with the commercial activity must itself be of a commercial nature, or may it include sovereign acts, such as expropriation. In other words, can a U.S. court exercise jurisdiction over expropriation claims which are deemed to meet the requirements of the commercial activity exception, § 1605 (a)(2), because of some perceived connection between the expropriation and the commercial activity? The House Report's section-by-section analysis explains that the second clause of this section denies immunity in a "case where a claim arises out of a specific act in the United States which is *commercial or private in nature* and which relates to a commercial activity

159. H.R. REP. No. 1487, *supra* note 19, at 18-19.

160. 28 U.S.C.A. § 1605(a)(2) (West Supp. 1993) (emphasis added).

161. *Id.*

abroad.”¹⁶² In light of the similarity between the three clauses of the commercial activity exception, with the exception of minor differences in where the “act” must occur, those three sections should be interpreted similarly. This analysis, in light of the House’s Report, strongly suggests that the act performed “in connection with a commercial activity” must be commercial as well.¹⁶³

Thus, a claim falling under § 1605(a)(2) must, logically, be construed as one which is (1) based on a commercial act, (2) carried on in the United States or outside it, (3) causing a direct effect in the U.S., and (4) in connection with a commercial activity. Pursuant to congressional intent as reflected in the language of § 1605(a)(2), expropriation’s “quintessentially sovereign,”¹⁶⁴ rather than commercial, nature necessarily precludes the court from exercising jurisdiction under the commercial activity exception.

The case law also supports this interpretation of the relationship between the commercial activity exception and expropriation claims, as well as expropriation’s characterization as a sovereign act not reviewable by U.S. courts. For example, in *D’Angelo v. Petroleos Mexicanos*,¹⁶⁵ a holder of nationalized concession contracts sought compensation. The district court, in commenting on the commercial activities subsequent to the expropriation stated that “[t]he fact that the Mexican government ultimately entered the oil business through Pemex does not make the expropriation itself a commercial activity. It is a classic example of the exercise of governmental power as an act of the sovereign.”¹⁶⁶

*Carey v. National Oil, Corp.*¹⁶⁷ was a later, but the first major case concerning expropriation under the FSIA. The plaintiffs claimed they suffered damages as a result of Libya’s nationalization of foreign owned oil concessions.¹⁶⁸ This nationalization interrupted a supply contract between the plaintiffs and an affiliate of a

162. H.R. REP. NO. 1487, *supra* note 19, at 19 (emphasis added).

163. See Kahale, III, *supra* note 147, at 405-07. But see Von Mehren, *supra* note 46, at 58 (arguing that if the expropriation involves a concessions contract, then the breach of contract is a commercial activity within the meaning of § 1605(a)(2)).

164. See *supra* note 42.

165. 422 F. Supp. 1280 (D. Del. 1976), *aff’d*, 564 F.2d 89 (3d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978).

166. *Id.* at 1286.

167. 453 F. Supp. 1097 (S.D.N.Y. 1978), *aff’d on other grounds*, 592 F.2d 673 (2d Cir. 1979).

168. *Id.* at 1099.

company whose interests Libya nationalized.¹⁶⁹ The plaintiffs argued that the nationalization of oil concessions was an act "in connection with a commercial activity" because the nationalization was the first step in establishing an integrated oil business.¹⁷⁰

The district court rejected this argument. Stating that the FSIA "leaves no question that non-commercial activities of a foreign state will be treated with the same deference to which they were entitled before 1976,"¹⁷¹ the court explained that "nationalization is the quintessentially sovereign act, never viewed as having a commercial character."¹⁷² The court viewed all events, irrespective of their commercial nature, as events emanating from the nationalization and, as such, non-reviewable, sovereign acts.

Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahiriya,¹⁷³ another case involving nationalization, is consistent with *Carey*.¹⁷⁴ The plaintiff alleged that the waiver, commercial activity, and expropriation exceptions granted the court jurisdiction to adjudicate a suit for the expropriation of its physical assets and concessions interests. The plaintiff claimed the nationalization constituted a breach of contract, and was, therefore, commercial in nature within the meaning of § 1603(d)¹⁷⁵ of the FSIA.¹⁷⁶ Although finding that Libya waived its immunity,¹⁷⁷ the court, nevertheless, held the act of state doctrine applicable.¹⁷⁸ The court characterized

169. The plaintiffs themselves did not have property nationalized by Libya. *Id.*

170. Kahale, III, *supra* note 147, at 411 (citing Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 34, *Carey v. Nat'l. Oil, Corp.*, 453 F. Supp. 1097 (S.D.N.Y. 1978)).

171. *Carey*, 453 F. Supp. at 1102.

172. *Id.*

173. 482 F. Supp. 1175 (D. D.C. 1980). See generally Paul A. Pavlis, Note, *International Arbitration and the Inapplicability of the Act of State Doctrine*, 14 N.Y.U. J. INT'L L. & POL. 65 (1981).

174. See *supra* text accompanying notes 167-72. But see *American Group, Inc. v. Islamic Republic of Iran*, 493 F. Supp. 522, 526 (D. D.C. 1980, *vacated on other grounds*, 657 F.2d 430 (D.C. Cir. 1981) (holding that uncompensated expropriation resulting in a State monopoly fell within § 1605(a)(2)).

175. "A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C.A. § 1603(d) (West Supp. 1993).

176. Kahale, III, *supra* note 147, at 413 (citing Memorandum of Libyan American Oil Co. in Opposition to Motion to Dismiss and in Support of Petition to Confirm Arbitral Award at 31-42, *Libyan American Oil*).

177. 482 F. Supp. at 1178.

178. *Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahiriya*, 482 F. Supp. 1175, 1179 (D.D.C. 1980).

expropriations as "public acts of the sovereign removed from judicial scrutiny,"¹⁷⁹ and said that Libya's nationalization was a "classic example of an act of state."¹⁸⁰

Where a claimant asserts jurisdiction under the commercial activity exception based on post-expropriation activities with the expropriated business, the court is likely to hold that the claim is rooted in expropriation, not commercial activity. *Alberti v. Empresa Nicaraguense De La Carne*¹⁸¹ addressed these jurisdictional issues surrounding the commercial activity and expropriation exceptions. Alberti owned 35% of the stock of a livestock slaughtering business which was nationalized in 1979.¹⁸² The government of Nicaragua continued operating the business through a state company.¹⁸³ After his business' expropriation, Alberti ordered beef from the state company, but refused to pay for it.¹⁸⁴ Instead, he sued for conversion of his stock and sought to offset the purchase with the uncompensated nationalization.¹⁸⁵ The court held that the suit was not "based upon" the commercial activity.¹⁸⁶ "The commercial transaction involved, the beef shipment, ha[d] nothing to do with this lawsuit beyond the fact that it gave rise to the debt plaintiffs [sought] to offset. The basis of this lawsuit was the nationalization of [plaintiff's stock], which was a quintessential government act."¹⁸⁷ The fact that the state agency continued the operations of the expropriated business, leading to United States sales, did not concern the court. It reasoned that the court must not allow a plaintiff to transform a dispute arising from a governmental act, nationalization, into a commercial dispute.¹⁸⁸ Therefore, it viewed the entire dispute as one arising from a sovereign act.

Furthermore, courts deny plaintiffs the opportunity to re-define the foreign state's "act" performed to fall under a section of the FSIA favorable to the particular plaintiff. In *Magnus Electronics, Inc. v. Royal Bank of Canada*,¹⁸⁹ for example, the plaintiff

179. *Id.*

180. *Id.*

181. 705 F.2d 250 (7th Cir. 1983).

182. *Id.* at 252.

183. *Id.* Alberti did not receive compensation for the nationalization of his property. *Id.*

184. *Id.*

185. *Id.*

186. *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 254 (7th Cir. 1988).

187. *Id.*

188. *Id.*

189. 620 F. Supp. 387 (N.D. Ill. 1985).

sued for the conversion of goods shipped to an Argentine buyer.¹⁹⁰ The Argentine air force pirated the goods when they were in Argentine customs.¹⁹¹ The plaintiff claimed jurisdiction under the commercial activity exception.¹⁹² But the court held that a plaintiff could not force its lawsuit based on tortious conduct, an act of piracy, "into the mold of 'commercial activity' of a foreign state."¹⁹³ "[F]or better or worse, governmental expropriation of private property is the paradigmatic instance of activity coming under the first rubric [sovereign activity] and not the second [commercial activity]."¹⁹⁴ Thus, expropriation remains a sovereign act which confers upon sovereign states' immunity from suit.

Courts also reject plaintiffs' attempts to characterize their expropriation claims as noncommercial tort claims under § 1605(a)(5). In *De Sanchez v. Banco Central De Nicaragua*,¹⁹⁵ Nicaragua stopped payment on plaintiff's certificate of deposit. Since the plaintiff was a citizen of the expropriating country, the court had no jurisdiction under the international takings exception.¹⁹⁶ She, instead, brought her claim under the noncommercial tort exception, alleging misrepresentation and conversion of property. But the court held that Congress did not intend "plaintiffs to be able to rephrase their taking claims in terms of conversion and thereby bring the claims even where the takings were permitted by international law."¹⁹⁷

*Chuidian v. Philippine National Bank*¹⁹⁸ also rejected an attempt to convert a taking claim into a noncommercial tort claim. A plaintiff's claim for expropriation must fall under § 1605(a)(3).¹⁹⁹ "To hold otherwise would be to allow plaintiffs to escape the requirements of § 1605(a)(3) through artful recharacterization of their takings claims."²⁰⁰

190. *Id.* at 388-89.

191. *Id.*

192. *Id.* at 389.

193. *Id.* at 390.

194. *Magnus Electronics, Inc. v. Royal Bank of Canada*, 620 F. Supp. 387, 390 (N.D. Ill. 1985).

195. 770 F.2d 1385 (5th Cir. 1985). See generally *Havkin*, *supra* note 23.

196. 770 F.2d at 1394-97. The court held that uncompensated expropriation of property belonging to nationals did not violate international law. *Id.*

197. *Id.* at 1398.

198. 912 F.2d 1095 (9th Cir. 1990) (the Philippine government dishonored a letter of credit payable to the plaintiff, a Philippine national).

199. *Id.* at 1106.

200. *Id.*

Given that the restrictive theory grants immunity for sovereign acts, and expropriation constitutes a sovereign act, the commercial activity following the expropriation was an irrelevant basis for § 1605(a)(2) jurisdiction.²⁰¹ This is because the post-expropriation commercial activities did not have a sufficient nexus to the act of expropriation. This analysis is similarly compelling in the case of *Siderman de Blake*.²⁰² Argentina first expropriated INOSA and then continued operating it, creating commercial activities connected with the United States.²⁰³

All these cases are consistent with the view that the Sidermans' expropriation claims must fall under § 1605(a)(3) to grant the court jurisdiction. These cases repeatedly characterize expropriation as a sovereign act, not contemplated by Congress in the commercial activity exception. Post-expropriation acts of the country or agency are irrelevant because they necessarily emanate from a sovereign act, and are not sufficiently related to the act of expropriation.

This interpretation of the commercial activity exception is also the most reasonable. First, restricted jurisdiction over claims arising from expropriation comports with congressional intent.²⁰⁴ Second, providing courts with jurisdiction because of these later "commercial activities" allows plaintiffs to escape the burdens of the international takings exception. For example, Congress expressly stated that the expropriation must violate international law.²⁰⁵ In *Siderman de Blake*, allowing the Sidermans to allege jurisdiction under the commercial activities exception allows them to sue for expropriation without a finding of a "violation of international law."

Last, applying the commercial activity exception to claims based on the expropriating country's post-expropriation commercial activities seriously limits the sovereign's rights to expropriate and its respective benefits. While the expropriation of INOSA may be discriminatory, other expropriations serve economic and social goals. Irrespective of whether the expropriation is for social or dis-

201. The court commented on the nature of the action in the context of plaintiff's claim that the commercial activity exception to the act of state doctrine applied. *Id.*

202. See 965 F.2d 669, 706-13 (9th Cir. 1992).

203. *Id.*

204. See *supra* notes 40-56 and accompanying text (analyzing the requirements of § 1605(a)(3)).

205. 28 U.S.C.A. § 1605(a)(3) (West Supp. 1993).

criminary reasons, American courts taking jurisdiction because of post-expropriation commercial activities must review acts of governments which Congress intended to be reviewable only within the narrow confines of § 1605(a)(3).

B. *The Expropriation Exception*

1. Article 21 of the American Convention

The Ninth Circuit, like other courts,²⁰⁶ was too quick to overlook the possibility that uncompensated expropriation from a country's nationals might violate article 21 of the American Convention on Human Rights (American Convention).²⁰⁷ The American Convention's primary objective is the protection of basic human rights derived from human personality, irrespective of nationality.²⁰⁸ Most notably, unlike the Covenant on Civil and Political Rights or the Rome Convention, the American Convention expressly provides for a "right to property."²⁰⁹

Nationals and non-nationals are not distinguished under article 21. A "plain language" interpretation of the article suggests that, unlike traditional expropriation law, the right to property applies to both nationals and non-nationals. The fact that most human rights treaties do not provide such a right underscores the

206. *De Sanchez v. Banco Central De Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985) (uncompensated expropriation from a country's nationals does not violate international law); see also *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1105 (9th Cir. 1990); *Verlinden B.V. v. Central Bank of Nigeria*, 647 F.2d 320, 325 n.16 (2d Cir. 1981), *rev'd on other grounds*, 461 U.S. 480 (1983); see also RESTATEMENT, *supra* note 50, § 712, cmt. a.

207. Article 21 of the American Convention provides:

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
3. Usury and any other form of exploitation of man by man shall be prohibited by law.

American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36, at 7, OEA/ser. L/V/II.23 doc. rev.2 entered into force July 18, 1978 [hereinafter American Convention].

208. THOMAS BUERGENTHAL ET AL., *PROTECTING HUMAN RIGHTS IN THE AMERICAS, SELECTED PROBLEMS* 55 (2d ed. 1986); Hector Gros Espiell, *The Organization of American States, in THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS* 555 (Philip Alston ed., 1982).

209. Espiell, *supra* note 208, at 573 n.45. But see Protocol No. 1 to the European Convention on Human Rights and Fundamental Freedoms, Mar. 20, 1952, Europ. T.S. No. 9, 213 U.N.T.S. 262 (1952) (providing that "no one shall be deprived of his possessions . . .").

international community's decreasing concern with the protection of property.²¹⁰ However, according to U.S. courts, although the distinction between aliens and nationals is eroding for basic human rights, like the rights not to be murdered, tortured, or otherwise subjected to cruel and inhuman punishment, this distinction remains important to expropriation claims.²¹¹

Unlike peremptory norms, the American Convention, with its treaty-like character, is binding only upon those states agreeing to be bound. However, some rights in the treaty may be *jus cogens* and binding on non-contracting nations. Argentina bound itself to the treaty with its own set of reservations, ratifying the American Convention on September 5, 1984.²¹²

Because Argentina's act of expropriation occurred before ratifying the American Convention, whether the American Convention applies to INOSA's expropriation remains an unanswered question. Regardless of how one resolves this issue within the contours of *Siderman de Blake*, Latin American countries are now party to the American Convention. Thus, the issue is unresolved and deserves brief discussion.

2. Analyzing the Expropriation of INOSA Within the Contours of Article 21

The expropriation of INOSA is inconsistent with article 21.²¹³

210. Richard B. Lillich, *Civil Rights*, in *HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES* 157 (Theodor Meron ed., 1984); see also Espiell, *supra* note 208, at 559. "Inclusion of the right to property is not wholly justified, for the view could be taken that the question falls within the competence of the national legislature." *Id.*

211. *De Sanchez v. Banco Central De Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985). See also generally *Lithgow v. United Kingdom*, 8 Eur. Hum. Rts. Rep. 329 (1986) (European Commission on Human Rights held that Protocol 1 only gave non-nationals a remedy for uncompensated nationalizations because of generally recognized principles of international law); R. Anthony Salgado, Note, *Protection of National's Rights to Property Under the European Convention on Human Rights: Lithgow v. United Kingdom*, 27 VA. J. INT'L L. 865 (1987).

212. HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 65, OEA/Ser. L./V./II.65 doc. 6 (1985) [hereinafter OAS HANDBOOK]. Reservations cannot be incompatible with the purpose of the treaty. See BUERGENTHAL, *supra* note 208, at 52-65, 386; MERON, *supra* note 67, at 17-20.

213. There is an issue as to whether the American Convention protects the rights of shareholders. The American Convention only protects the rights of individuals. American Convention, *supra* note 207, art. 1. Therefore, it is unsettled whether shareholders allege corporate rights or rights as natural persons. In one case, after the Nicaraguan Government nationalized several industries in 1979, Carlos Martínez Rigüero, a shareholder in confiscated Empresa Cereales de Centroamérica, S.A., filed a petition with the Inter-American

The second clause of the article states that "[no] one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law."²¹⁴

Thus, INOSA's expropriation was in conflict with article 21 in three ways. First, Argentina did not compensate the Sidermans for the expropriation of INOSA.²¹⁵ Second, the expropriation did not serve Argentina's "public utility or social interest."²¹⁶ Last, the Tucumán Supreme Court's order to the military to end the intervention of INOSA is testimony to the expropriation's deviation from the forms established by Argentina's law.²¹⁷

Yet, because Argentina took a reservation to article 21,²¹⁸ the Article's application is subject to limitations. That reservation declares that Argentina is not subject to questions relating to its economic policy, nor anything "the national courts may determine to be matters of 'public utility' and 'social interest,' nor anything they may understand to be 'fair compensation'."²¹⁹

The meaning of this reservation is not entirely clear. For example, while article 21 refers to "just compensation," the reservation refers to "fair compensation." Therefore, how this reservation would apply to the Sidermans' claim remains ambiguous.

Nevertheless, article 21's applicability to the FSIA is significant because it suggests a jurisdictional basis for expropriation claims arising out of situations similar to the Sidermans'. In *Siderman de Blake*, while Susana was a U.S. citizen who could as-

Commission on Human Rights. Case 7788, Inter-Am. C.H.R. 89, OEA/ser. L/V/II.71, doc. 9 rev. 1 (1987). He alleged the government violated his right to property as set forth in article 21 of the American Convention. *Id.* at 97-98. The Commission agreed. By declaring that Nicaragua violated the shareholder's right to property, the Commission held article 21 applicable to corporate shareholders in their individual capacities. *Id.* at 109-10. However, in a later case involving Peru's announced plan to expropriate all privately held shares of Peruvian banks, the Commission held that there was no violation of article 21. Case 10,169, Inter-Am. C.H.R. 423, OEA/ser. L/V/II/79 doc. 12 rev. 1 (1991). With little analysis, the Commission held that expropriation would affect the rights of the corporations and not those of individuals. *Id.* at 425. In light of these two decisions, the issue of whether, under the American Convention, the intervention of INOSA affected its corporate rights or the property rights of the Sidermans remains unresolved.

214. OAS HANDBOOK, *supra* note 212, at 36.

215. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 704, 712 (9th Cir. 1992).

216. *Id.* at 703-04.

217. *Id.* at 704.

218. OAS HANDBOOK, *supra* note 212, at 64-65.

219. OAS HANDBOOK, *supra* note 212, at 65.

sert jurisdiction under the international takings exception, José, Lea, and Carlos, were Argentinians at the time of INOSA's expropriation. They could not assert jurisdiction under that section. Thus, they relied on the commercial activities exception to assert their claim for INOSA's expropriation. However, the taking should have qualified as "property taken *in violation of international law*," cognizable under § 1605(a)(3) because the expropriation of INOSA violated international law by violating article 21.²²⁰ Distinguishing between Susana Siderman de Blake and the other members of the Siderman family would then be irrelevant. The application of the commercial activities exception would, therefore, be unnecessary because the court would have jurisdiction under the expropriation exception.

C. The International Law Principle of Jus Cogens and its Relationship to the FSIA

The court, at least partially, misinterpreted the Sidermans' position that a violation of *jus cogens* waived sovereign immunity. According to the court, the Sidermans claimed jurisdiction under a nonexistent section of the FSIA, one that provides an immunity exception to a state violating *jus cogens* norms. But the Sidermans understood that their claims must fall within one of Congress' enumerated FSIA exceptions to strip Argentina's immunity. Thus, they argued that a nation implicitly waives immunity under § 1605(a)(1) when it violates a peremptory norm of international law.²²¹

Both the courts' and the Siderman's positions are consistent with the rule that attempts to claim jurisdiction under an exception to immunity falling outside the listed exceptions of § 1605 must fail after *Amerada Hess*.²²² In that case, the Supreme Court drew "the plain implication that immunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions."²²³ The Court reasoned that the denial of immunity to foreign states in suits "in which rights in property taken in violation of international law are in is-

220. Of course this is subject to how one interprets the validity and application of Argentina's reservation to article 21.

221. Brief for Appellant at 35-42, *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992) (No. 82-1772), *cert. denied*, 113 S. Ct. 1812 (1993).

222. *Argentine Republic v. Amerada Hess Corp.*, 488 U.S. 428 (1989).

223. *Id.* at 436.

sue," showed Congress' intent to prohibit immunity only for specific international law violations within the enumerated exceptions.²²⁴ The Court held that Congress had international law in mind when it adopted the FSIA, evidenced by the international takings exception, and that Congress intentionally omitted other violations of international law as grounds for denial of a nation's immunity.²²⁵

This position is absurd in the context of *Siderman de Blake*—a case not contemplated by *Amerada Hess*.²²⁶ It is absurd to suggest that, while Congress denied immunity for takings of property which violate international law, Congress intentionally conferred immunity for torture—a basic human rights violation which breaches the highest principles of international law reflected in its status as a peremptory norm.

A more compelling explanation for Congress' express inclusion of § 1605(a)(3) is that, although expropriation, unlike torture, is an act fundamentally consistent with sovereignty, courts have been granted limited jurisdiction over expropriation claims. Limited jurisdiction over such claims ensures that only expropriation claims, meeting the strict requirements of § 1605(a)(3), deny a country immunity.

At least one court has shown its frustration with the absurdity created by the FSIA in combination with *Amerada Hess*. The District of Columbia District Court held, in *Princz v. Federal Republic of Germany*,²²⁷ that Germany was not immune from suit for violations of an American citizen's human rights during World War II.²²⁸ Nazi Germany interned the plaintiff while he was a U.S. citizen in two concentration camps during World War II.²²⁹ What is key to this decision is that the court went outside the FSIA to find jurisdiction. Judge Sporkin explained:

224. *Id.*

225. *Id.* at 435-36.

226. See *Princz v. Federal Republic of Germany*, 813 F. Supp. 22 (D.D.C. 1992) (arguing that neither Congress nor *Amerada Hess* contemplated peremptory norms in their codification or interpretation of the FSIA, and that Congress could not have wanted a government to hide behind the cloak of immunity after a total disregard for the rights of a U.S. citizen).

227. *Princz v. Federal Republic of Germany*, 813 F. Supp. 22 (D.D.C. 1992). But see *Denegri v. Republic of Chile*, No. 86-3085, 1992 U.S. Dist. LEXIS 4233 (D.D.C. 1992) (rejecting the argument that a country waives immunity by violating a peremptory norm, because of the strict interpretation given the FSIA by *Amerada Hess*).

228. 813 F. Supp. at 26.

229. *Id.* at 23.

[t]he Supreme Court did not have such extraordinary facts as those presently before this Court in rendering its decision in *Hess*. And the court cannot believe that, in enacting the Foreign Sovereign Immunities Act, Congress contemplated a factual scenario akin to that at bar. . . . Therefore, this Court concludes neither *Hess* nor the FSIA bars this Court from hearing the plaintiff's claim.²³⁰

He continued, "[t]his Court finds that the Federal [sic] Sovereign Immunity Act has no role to play where the claims alleged involve undisputed acts of barbarism committed by a one-time outlaw nation which demonstrated callous disrespect for the humanity of an American citizen, simply because he was Jewish."²³¹

D. A Framework for Analyzing Jus Cogens Violations as a Basis for Stripping FSIA Immunity

Overruling *Amerada Hess* or ignoring the FSIA is unnecessary to find a jurisdictional basis for adjudicating claims against foreign sovereigns who violate *jus cogens*. A better approach is rooted in the position that nations that violate peremptory norms of international law impliedly waive immunity²³² by acting in ways that are fundamentally inconsistent with sovereignty. Under this theory, courts may deny immunity to states that torture and remain consistent with the FSIA, as interpreted by the Supreme Court.

The FSIA's legislative history provides three examples of an implied waiver.²³³ Implied waivers result when a foreign state either (1) agrees to arbitration; (2) agrees that a particular country's law should govern a contract; (3) or files a responsive pleading without raising an immunity defense.²³⁴ The implied waiver of immunity exception is narrow.²³⁵ The narrowness of implied waiver and that of *jus cogens*, by definition, are complementary. Only a small number of international law norms fit the description of pe-

230. *Id.* at 26.

231. *Id.*

232. See Belsky, *supra* note 24, for a comment arguing that states implicitly waive immunity by violating *jus cogens* norms.

233. The FSIA does not itself give examples of what constitutes a waiver. 28 U.S.C.A. § 1605(a)(1) (West Supp. 1993).

234. H.R. REP. NO. 1487, *supra* note 19, at 18.

235. Werthan, *supra* note 46, at 126. See generally *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co., et al. v. Navimpex Centrala Navala & Uzinexportimport*, 989 F.2d 572 (2d Cir. 1993) (state owned shipbuilding contractor implicitly waived immunity under § 1605(a)(1) of the FSIA).

remptory norms. Therefore, including violations of peremptory norms as a basis for an implied waiver would do little to expand the scope of the waiver exception.

Precluding suits rooted in states' sovereign acts is the purpose of the FSIA. Logically, a state loses its immunity for non-sovereign actions, such as engaging in a commercial activity.²³⁶ In essence, because the FSIA predicates immunity on sovereign acts, and then provides exceptions, a country implicitly waives such immunity precisely by acting in ways fundamentally inconsistent with sovereignty.²³⁷ Torture is inconsistent with sovereignty not merely because it is abhorrent, but because it violates long-recognized, international law principles, as reflected by its status as a peremptory norm. It is the violation of *jus cogens*, resulting from a sovereign's acts of torture, which makes these acts fundamentally inconsistent with sovereignty. An implicit waiver of immunity under those conditions is exceedingly appropriate.

The second example of an implied waiver provided in the FSIA's legislative history provides an additional analytical framework for waiving immunity for *jus cogens* violations. Under this second example, a foreign state waives immunity when it agrees that a particular country's law governs a transaction.²³⁸ A peremptory norm does not require such an express agreement; it is automatically binding on all nations.²³⁹ A nation "is bound both to observe and construe the accepted norms of international law, formerly known as the law of nations."²⁴⁰ The requirement of international consensus before a norm becomes *jus cogens* is important because it manifests the mutual assent of nations to be bound by a particular legal principle. Just as two parties can agree to be bound by a particular law, countries, as members of the international community, implicitly agree to be bound to peremptory norms. It, therefore, justifies waiving immunity for its violators.

United States courts agree with the position that a country that violates a peremptory norm like torture engages in behavior that is fundamentally inconsistent with sovereignty. United States

236. 28 U.S.C. § 1605(a)(2) (West Supp. 1993).

237. The structure of the FSIA creates a presumption of immunity. It lists exceptions to this presumption. When a government acts in a non-sovereign capacity, engaging in commercial transactions or committing torts in the United States, then the cloak of immunity drops. 28 U.S.C.A. § 1605(a)(2),(5) (West Supp. 1993).

238. H.R. REP. NO. 1487, *supra* note 19, at 18.

239. BROWNLEE, *supra* note 42, at 513; see *supra* notes 72-75 and accompanying text.

240. *Filartiga v. Pena-Irala*, 630 F.2d 876, 877 (2d Cir. 1980).

Courts, for example, have expressly refused to regard assassinations as acts for which foreign states are immune.

In *Letelier v. Republic of Chile*,²⁴¹ as a result of Chile's participation in the assassination of her former ambassador to the United States, the court denied Chile immunity.²⁴² The court refused to view an assassination plot as a discretionary act provided with immunity under § 1605(a)(5)(A).²⁴³ A country "has no 'discretion' to perpetrate conduct designed to result in the assassination of an individual or individuals, action clearly contrary to the precepts of humanity as recognized in both national and international law."²⁴⁴

In *Liu v. Republic of China*,²⁴⁵ the court said "planning and conducting the murder of Henry Liu could not have been a discretionary function as defined by the FSIA."²⁴⁶ Plotting an assassination could involve policy judgments, and could, therefore, be the public act of a state. Nevertheless, because it violated international human rights law,²⁴⁷ the court held that there was no "room for policy judgement and decision."²⁴⁸

It is because of the violation of human rights law that courts refuse to view these acts as consistent with fundamental principles of sovereignty. Violating states are not immune under § 1605(a)(5) when such human rights violations are committed in the United States.²⁴⁹ Yet, whether those acts occur in the United States or on foreign land, their nature is the same. They are not consistent with fundamental principles of sovereignty. While the Sidermans were not alleging jurisdiction under § 1605(a)(5) because José Siderman's torture occurred in Argentina, the reasoning of *Letelier* and *Liu* are relevant. The same basis for which courts cannot re-

241. 488 F. Supp. 665 (D.D.C. 1980).

242. *Id.* at 673.

243. *Id.* § 1605(a)(5)(A) provides a foreign State immunity for torts occurring in the U.S. if they result from a discretionary function of the foreign State, whether or not the discretion is abused.

244. *Id.* at 673.

245. 642 F. Supp. 297 (N.D. Cal. 1986).

246. *Id.* at 305 (referring to § 1605(a)(5)(A)).

247. RESTATEMENT, *supra* note 50, § 702(c) (stating that murder violates customary international law unless it follows due process or an exigent circumstance, such as in a police officer's line of duty).

248. 642 F. Supp. at 305 (basing its reasoning in part on *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980)).

249. See *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980); *Liu v. Republic of China*, 642 F. Supp. 297 (N.D. Cal. 1986).

gard assassinations as discretionary acts should apply to torture as being inconsistent with sovereignty.

Foreign states lend credence to the characterization of torture as fundamentally inconsistent with notions of sovereignty. In the State Department's experience, no government has ever asserted a right to torture its own nationals.²⁵⁰ Rather than asserting a right to torture, a country accused of such a crime usually denies it.²⁵¹ One commentator has observed that:

[t]he best evidence for the existence of international law is that every State recognizes that it does exist and that it is itself under an obligation to observe it. States often violate international law, just as individuals often violate municipal law; but no more than individuals do States defend their violations by claiming that they are above the law.²⁵²

Therefore, by not claiming a sovereign right to torture, nations implicitly admit that it is not within their sovereign power to torture.

Furthermore, holding under the FSIA that nations violating peremptory norms are not immune from suit in U.S. courts is consistent with legislative intent. "[T]he central premise of the bill: [is] [t]hat decisions on claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which *incorporates standards recognized under international law*."²⁵³ In another section Congress has stated that "[s]overeign immunity is a doctrine of international law."²⁵⁴ In short, it is the intent of Congress that courts interpret the FSIA consistently with standards of international law. Therefore, courts that strip the immunity of nations that violate the highest standard of international law—peremptory norms—further Congress' interpretational objective. On the other hand, courts which do not deny that immunity frustrate congressional objectives.

This interpretation of the FSIA is advantageous and logical because it preserves the necessary flexibility for adoption of evolving international law standards by effectively incorporating newly

250. *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (quoting Memorandum of the United States as *amicus curiae* at 16 n.34).

251. *Id.* Less frequently, they assert that the torture was unauthorized or that the "rough treatment" fell short of torture. *Id.*

252. *Id.* at 884 n.15 (quoting J. BRIERLY, *THE OUTLOOK FOR INTERNATIONAL LAW* 4-5 (1944)).

253. H.R. REP. NO. 1487, *supra* note 19, at 14 (emphasis added).

254. *Id.* at 8.

recognized international law principles. The implied waiver exception provides the best method for accomplishing this. Professor Riesenfeld²⁵⁵ would support this argument:

the question arises whether inclusive codifications hamper the development of rules which permit redress in domestic courts for serious international wrongs. While the United States statute, alone among all others, provides, within narrowly defined boundaries, exceptions from immunity from suit in cases of expropriation in violation of international law, it does not expressly restrict immunity in cases where redress is sought for personal injury suffered outside the forum state by actions constituting recognized violations of human rights, such as torture with the complicity of a foreign state. It would seem that in such cases customary international law bars entitlement to immunity and that state laws should not thwart the administration of international justice in such cases, at least so long as the offending state does not offer a more convenient forum. To consider codifications comprehensive and exclusive is unsound and not to be implied, unless there is a clear legislative mandate to that effect.²⁵⁶

Violations of *jus cogens* norms disrupt international order.²⁵⁷ They impact all states and all persons. Today's international community is comprised of a diverse spectrum of social, economic, and political organization.²⁵⁸ The allegiance of nations, as a consequence, depends on the allegiance of all its members to norms which, at the very least, protect and promote coexistence in an organized society. This requires a concept of sovereignty that embodies both rights and duties. Peremptory norms provide some of the essential components of the modern law definition of sovereignty to incorporate this concept.

Recognizing violations of peremptory norms as an international problem,²⁵⁹ one court has said that "for purposes of civil liability, the torturer has become—like the pirate and slave trader

255. Emanuel S. Heller Professor of Law Emeritus, University of California, Berkeley.

256. Stefan A. Riesenfeld, *Sovereign Immunity in Perspective*, 19 VAND. J. TRANSN'L L. 1, 16-17 (1986).

257. BUERGENTHAL, *supra* note 208, at 29.

258. Belsky, *supra* note 24, at 391. Such heterogeneity is distinctly different from the homogeneity of the western nations that founded classical international law. *Id.*

259. The U.N. characterizes gross violations of human rights, such as widespread acts of torture, as a matter of international concern because they cause "international friction." BUERGENTHAL, *supra* note 208, at 29.

before him—*hostis humani generis*, an enemy of all mankind.”²⁶⁰ When both parties are foreign, as in the *Sidermans’* case, a U.S. court adjudicating a torture claim might offend foreign governments. However, the very fact that such suits involve violations of peremptory norms—violations of legitimate concern to the international community and all governments—defeats this objection. Governments necessarily accept outside scrutiny of their compliance with peremptory norms.²⁶¹ Yet, notwithstanding this outside scrutiny, governments do not always have the political will to condemn violators. Condemnation is less likely if, for example, the United States has an interest in maintaining good relations with the violating country.²⁶² Therefore, giving the aggrieved individual a remedy in court increases the likelihood that violators do not go unpunished. Judicial remedies also serve the interests of the international community of nations. Judicial, rather than political, sanctions save governments from the uncomfortable position of having to directly condemn violating nations.²⁶³ Torture is so strictly proscribed by the international community that reasons for protecting violating states with the cloak of immunity are weak to nonexistent. Neither “grace” nor “comity” need be extended to countries that blatantly violate peremptory norms.

As a result of *Siderman de Blake*, an individual cannot sue a foreign state in U.S. courts for violations of peremptory norms. Although the principle of *jus cogens* is forceful, since it is highly unlikely that violating states would be receptive to such claims, another forum must exist to apply it, if it is to have any practical effect. Furthermore, international condemnation does not always work as an effective deterrent to countries. Therefore, these norms require private individuals to ensure compliance and a legal system that adjudicates suits of this nature.

VI. CONCLUSION

The impact of *Siderman de Blake v. Republic of Argentina* is that today aggrieved plaintiffs will find it easier to sue for the expropriation of their property in their country of origin than for

260. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (emphasis in original).

261. *Belsky*, *supra* note 24, at 413. See generally *Parker & Neylon*, *supra* note 64, at 391.

262. See also generally HUMAN RIGHTS PRACTICE, *supra* note 69, at 13-14.

263. This assumes that violating nations understand the U.S. constitutional principle of separation of powers.

their brutal torture. By allowing plaintiffs to allege claims rooted in post-expropriation commercial activities, the court has unwittingly allowed a foreigner to sue for claims based on the expropriation of his property abroad, under the commercial activity exception. This, in turn, confuses both the commercial activity and expropriation exceptions. At the same time, *Siderman de Blake* stands for the proposition that foreigners shall not use U.S. courts to sue governments responsible for their torture. Thus, the Ninth Circuit has implicitly communicated that torturing states need not fear American judicial actions—but thieves must.

PHILIPPE LIEBERMAN*

* J.D. Candidate 1994, University of Miami School of Law. The author gratefully acknowledges and thanks Stephen J. Schnably, Professor of Law, for his time, effort, and guidance to make this Case Comment possible.